Supreme Court of the United States

OCTOBER TERM, 1910.

No. 157.

THE UNITED STATES,
Plaintiff in Error,

vs.

THE ST. ANTHONY RAILROAD CO.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE ST. ANTHONY RAILROAD COMPANY.

P. L. WILLIAMS,
Attorney for Defendant.

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vs.
THE ST. ANTHONY RAILROAD COMPANY.

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

BRIEF FOR THE ST. ANTHONY RAILROAD COMPANY.

STATEMENT OF THE CASE.

This is an action brought by the United States against the St. Anthony Railroad Company, a corporation of the state of Idaho, to recover the value of 1,702,000 feet of timber of the alleged value of $12.35 per thousand feet, and also for the value of 225,000 feet of the by-product of lumber manufactured from

the trees and timber which it is alleged the defendant in error unlawfully cut upon the unsurveyed public lands of the United States, and which lands it is alleged would be, when surveyed, in Township 9, Ranges 42, 43 and 44, East of the Boise Meridian, Township 18, Ranges 41, 42, 43 and 44 east of the said Meridian, and situated in Fremont County, in the state of Idaho, and in Townships 2 and 3 North, Range 42 East of said Meridian, situated in Bingham County, in said state of Idaho, and all in the Blackfoot Land District, the whole of said timber being as alleged, of the aggregate value of $21,469.70, and judgment for that sum, with legal interest, demanded.

The defendant in error by its answer admitted its corporate existence, as alleged, and that the United States was the owner of the lands described in the complaint. It denied that it unlawfully entered upon the lands mentioned or unlawfully felled or cut the timber or trees, or wilfully took or carried the same away, or wilfully converted to its use the said timber and lumber, and further denied that it felled or caused to be felled or appropriated or converted to its use any trees or timber of any amount or value except as in said answer expressly admitted.

For an affirmative defense the defendant averred that it was duly incorporated under the laws of the state of Idaho, on the 18th of May, 1899, for the purpose of constructing, owning, maintaining and operating a steam railroad from the town of Idaho Falls, in Bingham County, Idaho, to St. Anthony, in Fremont County, in said state, a distance of about forty miles. That on July 7th, 1899, the said company adopted the

route for its proposed railway as the same had been theretofore surveyed and located by its engineer, which line was shown upon maps then presented, and which is the same line and right of way upon which the defendant's railroad was afterwards actually built, and which it is now actually maintaining and operating.

It is further alleged that the said right of way so adopted passed through and over public lands of the United Stated, and that on or about July 7, 1899, the defendant caused to be filed in the local Land Office, at Blackfoot, Idaho, a copy of its articles of incorporation and due proofs of its organization, and also maps of its said right of way, together with certificates and affidavits in due form as required by law and the rules and regulations of the General Land Office. That said papers and maps were thereafter forwarded to and filed with the Secretary of the Interior, at Washington, on or about July 19th, 1899, and by him approved October 4th, 1899, and that defendant performed all things required of railroad companies by the Act of Congress granting to railroads the right of way through the public lands of the United States, approved March 3rd, 1875, and it thereby became entitled to the benefits and privileges therein granted to railway companies.

The defendant further alleged in its said answer that for the purpose of procuring the necessary material with which to construct its said railroad, it entered into a contract with the Thompson Mercantile Company, a corporation, of St. Anthony, Idaho, by the terms of which the said Mercantile Company was to furnish to defendant at the times and in the manner therein agreed upon, ties and timbers of dimensions

suitable for the construction of said railroad. That said timbers were to be used and were used solely for the purpose of the original construction of said railroad and the said Mercantile Company was by the express terms of said contract appointed the agent of the defendant, and in that capacity was authorized to cut timber for the said and no other purpose, upon, and to take the same from the public lands of the United States adjacent to the line of said railroad.

It is further averred that pursuant to the terms of said contract, and acting as the agent of defendant, the said Mercantile Company did enter upon the lands described in the complaint, the same being adjacent to the line of said railroad, for the purpose of procuring said ties and timbers, and did during the summer and fall of 1899 cut and remove of the trees and timber growing upon said lands, not to exceed 1,682, 975 feet, and did deliver the same to the defendant along the line of its said railroad, to be, and the same was used in the original construction of said road. That said timber was cut from the nearest timber-bearing public lands to said line of road, and were and are adjacent thereto. That all of said ties and timbers were necessary for the original construction of said road and were used for that purpose, and the defendant entered upon said lands through its said agent and cut and removed said timber and trees in good faith, with no intention of violating any law or committing any trespass, but believing that it had the right so to do, and if in so doing it has done any wrong, the same was not willful or intentional, but was due to inadvertence and mistake. That said timber as it stood upon said lands

when defendant caused the same to be cut, was not of the value to exceed one dollar per thousand feet, nor were said ties and timbers worth to exceed said amount per thousand feet, at the time this suit was commenced, after deducting defendant's reasonable expenses in causing said ties and timbers to be cut, sawed and delivered to and upon its said line of road.

The case was tried upon an agreed statement of facts, to the following effect:

1st. That the allegations contained in the complaint and not denied in the answer, are true.

2nd. That the amount of timber and lumber cut and taken by defendant is correctly stated in its answer. That the lands upon which the same was cut are correctly described in the complaint and were and are unoccupied, unentered public lands of the United States. That said timber was cut and carried away at the time stated in the complaint, and its value upon delivery to defendant was as alleged in the complaint.

3rd. That paragraphs (1), (2), and (3) of the affirmative part of defendant's answer are true.

4th. That paragraph (4) of said affirmative part of the answer is true, except the averment of value, the averment as to good faith and mistake, and the averment of "adjacency," and as to those matters it is agreed:

(a) That the value of said timber at the time and under the circumstances stated was $1.50 per thousand feet, instead of $1.00 as alleged;

(b) That as to the question of intent it is agreed that defendant did not act under a mistake of fact,—that is to say, defendant knew all the facts touching

the status of said timber on said lands and did what was done believing that it had the legal right so to do, such belief being based upon the advice of its counsel, an attorney of the said court, to the effect that it had such right. Defendant used ordinary care and prudence in first being advised as to the law, all the facts as they herein appear, relating to the status of said timber being known to said counsel, and there was no intention on the part of defendant to violate any law or do any wrongful act.

(c) Upon the issue of the "adjacency" of the lands upon which said timber was cut, to the railroad upon which it was used, it is agreed that the said lands were at the following distances, namely: From seventeen to twenty-three miles by air line; from twenty to twenty-five miles by wagon road; and from twenty-two to twenty-six miles following the sinuosities of the river upon which said timber was in part conveyed. By far the larger part of said timber was driven or rafted down said river from said lands to said railroad, the other part being hauled by wagon. The wagon road referred to and so used is an ordinarily good road, involves no unusual grades, and said timber could with reasonable profit be hauled by wagon from the place where it was cut to said railroad where it was used for ties and in the construction of bridges. It was further agreed that there were no other timber lands or suitable timber upon either side of said railroad as near as were the lands and timber in question, and that said lands are near enough and so located with reference to said railroad as to be directly and materially benefitted thereby.

Fifth. Upon the foregoing statement of facts, the following questions are to be submitted to the court for its decision:

(a) What are adjacent lands within the meaning of the Act of Congress of March 3rd, 1875, entitled "An Act granting to railroads the right of way through the public lands of the United States?"

(b) Whether said lands from which said timber was cut were adjacent to the said railroad within the meaning of said Act?

(c) Had said railroad company the right under said act to take from said lands the timber necessary for the construction of its said railroad?

(d) To what extent and for what amount is the said railroad company responsible for the timber cut as aforesaid, if at all?

(e) To what extent and for what amount is said railroad company liable, if at all, upon the above statement of facts and under the law as it shall be decided by the court?

That judgment should be entered by the court upon the foregoing statement of facts, and the law, as it should decide it. That admissions made in said statement of facts should bind the parties only for this suit, and not as to any other matter or case. Each of the statements of fact contained in the said stipulation was made subject to the objection of either party as to its relevancy or materiality.

The said case was submitted to the circuit court of the United States for the district of Idaho, upon the pleadings and said stipulation of facts, and judg-

ment was thereon rendered in favor of the defendant in said court, on the 23rd day of April, 1901. The opinion of United States District Judge Beatty in rendering said judgment is contained in the transcript of the record, pages 9 and 10.

Said case was taken upon writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, and that court affirmed the judgment of the court below, its opinion being contained in the transcript of the record on pages 15 to 18, and reported in 114 Fed. 722.

It is submitted that upon this record and the assignments of error, there are substantially but two questions to be determined, namely:

First: Were the lands upon which the timber was cut "*adjacent*" to defendant's line of road within the meaning of the Act of March 3rd, 1875?

Second: If not "*adjacent*," and therefore the defendant had no right to cut the timber, what rule of damages should measure the amount of recovery in this action?

ARGUMENT.

The part of the Act of March 3rd, 1875, material to this inquiry, is as follows:

> "That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory * * * which shall have filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of the organization under the same, to the extent of one hundred

> feet on each side of the central line of said road; *also the right to take, from the public lands adjacent to the line of said road, material, earth, stone and timber necessary for the construction of said railroad.*"
>
> 18 Statutes at Large, 482.

Contrary to the general rule of construction of land grants, we have the highest authority for a liberal construction of this Act in favor of the railway company.

Judge Deady (in U. S. vs Chaplin, 31 Fed. 890) discussing the general nature and spirit of the Act, speaks as follows at page 895:

"Before undertaking to interpret the language of the act in this connection, it is proper to consider its general nature and purpose. At first, the act is not a mere gratuity, but was evidently passed on the theory that it is for the interest of the grantor to promote the building of railways through the public domain. At its passage the United States was and still is the owner of millions of acres of wild and unsettled land. Congress intended to enhance the value and promote the settlement of these lands by inducing capital to build railways through them. The inducement is the right of way and the license to take material from the adjacent lands for the construction of the road."

This Court in the case of the United States vs. Denver & Rio Grande Railway Company, 150 U. S. 1, used the following language:

> "The general nature and purpose of the Act of 1875 were manifestly to promote the building of railroads through the immense public domain remaining unsettled and undeveloped

at the time of its passage. It was not a mere bounty for the benefit of the railroads that might accept its provisions, but was legislation intended to promote the interests of the government in opening to settlement, and in enhancing the value of those public lands through or near which such railroads might be constructed. To induce the investment of capital in the construction of railroads through the public domain, Congress had previously granted special rights, such as were conferred upon the defendant by the Act of 1872, but, by this Act of 1875, a general offer was made to any and all railroad companies of so much of the public domain as might be necessary for right of way, and ground adjacent thereto, for station buildings, depots, machine shops, side tracks, turnouts and water stations, with the right to take timber from the public lands adjacent to such road for the construction of the railway, provided such railway company should comply with the provisions of section four of the Act. * * *

When an Act operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a quasi public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted. Bradley vs. New York & N. H. R. Co., 21 Conn. 294; Pierce, Railroads, 491.

This is the rule, we think, properly applicable to the construction of the Act of 1875,

> rather than the more strict rule of construction adopted in the case of purely private grants."

That this rule was once correct was practically conceded by plaintiff in error in the court below; but to avoid its application to the case at bar it was contended that we live in a new age and the old order of things has passed away; that formerly nearly all lands in the western states were Government lands, and that timber growing thereon was practically the only timber available for the construction of railroads; that if railroad companies had at that time to purchase timber, would have entailed enormous, if not prohibitory expense; and therefore (it seems) the courts were in order to further railroad building and thus subserve the public welfare, under the necessity of so construing the law as to efficiently meet the supposed emergency, regardless of what the law-makers actually intended. That now, it is thought by some, and the courts should adopt the conclusion, railroad construction is no longer urgently demanded by the public interests; that railroads are more able than formerly to buy timber, and there are many persons who have it to sell; that therefore (it would seem) the courts should repeal that portion of the law which under the guise of construction they enacted.

Either such was the contention of the plaintiff in error or it must be understood to mean that Congress intended to pass a certain law; that such intention and such law are correctly evidenced by the Act of 1875, as the same has been heretofore construed by the court; that, however, the continued existence of such a law in

such a form is detrimental to public interests; and that therefor the law as it exists must be amended, and in its effect curtailed by judicial construction. Thus, without the exercise of any function by the legislative department of the government, we should have one law for one decade and substantially a different one for another decade. Indeed the opinion in the United States vs. Railroad Company, cited supra, was written in October, 1893, and the timber now in question was cut in the summer of 1899, scarcely six years having elapsed.

We should thus have one law for Colorado and another law for Idaho; and it might be observed in passing that Idaho in 1899 had more of the frontier conditions, which it is argued justify a liberal construction, than Colorado had in 1893.

But we respectfully submit, the views advanced by the plaintiff in error in the Circuit Court of Appeals in this regard cannot find favor in this court. It is the function of the courts under approved principles of construction, to determine and define the intent and scope of the Act of 1875. It is conceded that that has been done. Changed conditions, if they exist, are not for the courts, but they appeal to the Legislature. Even granting that by reason of the changed conditions suggested, it is no longer a wise public policy "to furnish railroad companies the material from the public lands for use in the building of their roads." such argument cannot be urged upon the courts; that is a matter for Congressional consideration. Moreover, it is not so clear that public interests are suffering. It is possible that the same far-sighted wisdom

that brought forth this act, has left it upon the statute book. In United States vs. Railroad Company, supra, the Court states that the purpose of the Act was in a sense selfish and not merely to bestow a bounty upon railroad companies. It was intended to enhance "the value of those public lands through or near which such railroads might be constructed." Has not that very purpose been strikingly subserved in the present instance. These very lands from which the timber was cut were enhanced in value, to say nothing of the great benefit to vast tracts of other lands belonging to plaintiff in error. It is agreed in the stipulation of facts (Trans. of record top page 7), "*that said lands are near enough and so located with reference to said railroad as to be directly and materially benefitted thereby.*" It thus appears conclusively that timber in this instance was no more a mere gratuity or bounty than was timber used immediately after the passage of the Act in 1875 in the construction of railroads.

MEANING OF THE WORD "ADJACENT."

It is true that objects cannot be adjoining or contiguous or next to each other, without also being adjacent, but on the other hand, they may be adjacent and yet not be contiguous or adjoining, or next to each other. To say that contiguous objects are adjacent to each other is not a discriminating use of language. In other words, "*adjacent*," strictly speaking, means near to, but not necessarily touching.

> "Two or three lots of land might be described as adjacent to the first, while only the second could be said to be adjoining."
>
> Bouvier's Law Dict.

"What is adjacent may be separated by the intervention of some other object."

"What is adjoining or contiguous must touch."

Worcester's Dict.

"Things are adjacent when they lie close to each other, not necessarily in actual contact: as adjacent fields, adjacent villages, etc."

Webster's International Dict.

Illustration—"I find that all Europe with her adjacent isles is peopled with Christians."—Howell.

The Standard Dictionary gives as the first, and most approved definition of the word adjacent: "Lying near or close at hand."

The Encyclopædic Dictionary gives as its preferred defination. "Lying near to."

The word adjacent is compounded of *ad* and *jaceo*, to lie near. What is *adjacent* may be separated altogether by the intervention of some third object.

Illustration—"They have been beating up for volunteers at York and the towns adjacent, but nobody will list."—Granville.

Crabb's English Synonyms.

In the matter of Ward, 52 N. Y. 397, the Court of Appeals of New York says:

"The word 'adjoining' in its etymological sense, means touching or contiguous, as distinguished from lying near or adjacent."

In the instruction given by the trial court, and approved by the appellate court, in the case of the United States, vs. Stone, 64 Fed. 667; 167 U. S. 178, this larger meaning of the word is clearly preserved by the use of the disjunctive "*or*." To be "*adjacent*," the Court says, lands must be "in proximity to, con-

tiguous to or near to the road." If therefore, lands are contiguons, they are within the law, if on the other hand they are "near to the road" though not contiguous, they are equally within the law.

In view of these definitions of lexicographers, it is obvious that no fixed and mathematical definition of the word "*adjacent*" can be given. Indeed, it seems now to be the settled doctrine of the courts that the word as used in the Act of 1875 is and was intended to be flexible and incapable of exact or comprehensive definition. No decision which has attempted to prescribe a mathematical or invarible formula to be applied to all cases, has gone unchallenged in the appelate courts. The result seems to be that each case must be adjudged upon its own facts, and that under general instructions from the Court, "*adjacency*" is a question for the jury.

In the case of the United Sta'es, vs. D. & R. G. R Co., 31 Fed. 886, Hallett, J., says:

> "The word 'adjacent' seems to be of flexible meaning, and to depend very much upon the context and the subject-matter to which it may be applied for its proper effect. As used in these acts, and with reference to the lands which may be taken for stations, side tracks, etc., it has the sense of contiguous or adjoining, while in the preceeding paragraph, and with reference to material for building the road, it is claimed, and with reason, that it should have the larger sense of nearness without actual contact. In a standard dictionary an illustration of the larger meaning of the word is given in this form: 'Things are *adjacent* when they lie near to each other, without actually touching, as adjacent fields, adjacent villages,

> etc. * * * Accepting the larger meaning of the word, the right to take timber from the public lands, under these acts, extends naturally some distance from the right of way, and probably within ordinary transportation by wagon."

In United States vs. Chaplin, 31 Fed. 890, Deady, J., Says:

> "This material appears to have been taken from certain townships through which the road runs, and no question is made but that such lands are "adjacent" to the line of the road. What is "adjacent" land, within the meaning of the statute, must depend on the circumstances of each particular case. Where the "adjacent" ends and the non-adjacent begins may be difficult to determine. On the theory that the material is taken on account of the benefit resulting to the lands from the construction of the road, my impression is that the term "adjacent" ought not to be construed to include any land save such as by its proximity to the line of the road is directly and materially benefitted by its construction."

See also

United States vs. Lynde, 47 Fed. Rep., 297.

United States vs. N. P. R. R. Co., 29 Alb. L. J. 24; 1 Ency. Law (2nd Ed.) 633.

Perhaps the most recent case from a court of high authority is that of Bacheldor vs. United States decided by the Circuit Court of Appeals, Eighth Circuit, in December, 1897, and reported in the 83rd Federal Reporter, p. 986. The question now under consideration was the sole question involved in the case.

The evidence discloses that the timber in question

was cut from land twenty-one and one-half miles distant from the line of the Denver & Rio Grande Railroad, or about twenty-five miles distant therefrom by wagon road, and that there was no timber nearer than that which had been taken, on either side of the road.

The trial court instructed in effect that "adjacent" would not permit cutting to be done beyond the limits of townships contiguous to the right of way of the railroad.

Thayer, C. J., delivering the opinion of the court, says:

> "The case at bar is the first, we believe, in which it has been ruled that, under the act of June 8, 1872, timber cannot be taken from the public domain by the defendant company, for the purposes named in the act, unless it is taken from lands lying in the townships through which the road is located, or from lands lying in the tier of townships next adjoining said townships on either side. *If Congress had intended to limit the defendant's right to take timber and other materials, for the construction of its road, to the townships last aforesaid, it would most likely have so declared in plain language and thus have freed the act from all doubt and uncertainty as to its meaning. The fact that Congress did not do so when conferring the right in question, but used the word "adjacent," which is purely a relative term, and may be understood differently when applied to different objects or under different circumstances, is very persuasive evidence that Congress did not intend to fix an arbitrary line on each side of the defendant's right of way, beyond which the right to take timber and other materials should not extend. The use of the phrase "lands adjacent" to the right of way, instead of fixing a more precise limit, as might well*

have been done by reference to the public surveys, indicates, we think, that it was not the intention of Congress to confine the privilege in question to particular townships or sections lying along the right of way, but that its purpose was to leave the right to take timber and other materials to be governed by circumstances.

"Congress intended to offer substantial inducements for the construction of railroads in certain sections of the country where timber suitable for railroad construction was known to be scarce, and in many places distant from the lines of the road to be benefitted, as they would be projected and built. *For that reason it did not establish a fixed line on either side of the right of way, which, if established, would at times render the privilege of taking material valueless; but it chose to confer the privilege in such terms as would allow the land department, and courts and juries as well, some discretion in determining, under different conditions, what was a proper limit within which it might be exercised.* It accordingly authorized timber and other materials to be taken from adjacent lands, leaving those whose duty it would be to see that the right was not abused, but was exercised in a reasonable manner, to decide in any given case whether the land from which the material had been obtained was adjacent to the right of way, within the spirit and intent of the act. For these reasons we cannot approve of the instruction which was given by the trial court, because it contains a definition of the term 'adjacent,' which, in our judgment, was not contemplated by the lawmaker.

"Assuming, then, as above indicated, that in cases arising under the acts of June 8, 1872, and March 3, 1875, above cited, the question whether timber or other materials have been taken from lands adjacent to the right of way of a railroad, is usually a mixed

question of law and fact, and that it cannot always be decided as a pure matter of law, it becomes necessary to determine what is the proper test by which the question should be determined. It is obvious, we think, that Congress did not intend to grant a general right to take timber from any part of the public domain wherever it was most convenient to take it. The use of the word 'adjacent' is of much significance, and renders it necessary in all cases to consider, in the first instance, whether the land from which the timber has been obtained for the construction of a railroad is near to or remote from the right of way. The inquiry whether it has been transported a considerable distance or only a few miles, is always an important consideration. Probably no better or more reasonable test can be applied than that which was first suggested by Judge Hallett in U. S. vs. Denver & R. G. R. Co., 31 Fed. 886, 889, namely, that timber should be regarded as adjacent to the right of way of a railroad, without reference to township or section lines, if it is within reasonable hauling distance by wagon. It is generally the case that timber suitable for railroad construction will not bear transportation by wagon from points remote from the established line of road, by reason of the expense incident to transporting it. If railroads, therefore, are limited in their right to take timber from the public domain to such timber standing on either side of their rights of way as they can reasonably afford to haul by wagon from the place where it is cut, it is probable that they will realize the full benefit of the privilege which Congress intended to confer and that the privilege will not be abused. In a case which presents conditions like the one at bar, and in others which may arise, no court can say as a matter of law, that a trespass

> was committed because the timber was taken from a place 25 miles distant by wagon road from the defendant's right of way; but it should be left to a jury of the vicinage to determine, under instructions from the court such as we have substantially outlined, whether the right accorded by the statute was fairly exercised as Congress intended it should be, or whether, by reason of the distance from which the timber in question was drawn, the defendant should be regarded as a trespasser."

In the court below it was tacitly conceded by the plaintiff in error that the lands now in question are "adjacent" to the defendant's line of road within the principles of construction announced in these various decisions. It was also there conceded that the facts in the case of United States vs. Bacheldor were substantially identical with those here involved; if there are any material distinctions they are in favor of this defendant.

But it was further contended that these decisions were in conflict with, and overruled by, the decision of this court in the case of the United States v. Stone, 167 U. S., 178, and which affirmed the judgment of the Circuit Court of Appeals in the Ninth Circuit, and reported in 64 Federal, 667. If there is such conflict between the Bacheldor case and the Stone case it is indeed strange that it escaped the attention of the court of Appeals for the Eighth Circuit, for under the circumstances and in the light of the opinion in the Bacheldor case it is apparent that that court discovered no conflict. As observed in the opinion of District Judge Beatty in the Circuit Court for the District of Idaho (Trans. of record, page 10) when the Bacheldor deci-

sion was rendered the court must have been aware of the decision of the Supreme Court in the Stone case, which had been announced seven months before. But even if ignorant of the Supreme Court decision, it was familiar with the decision of the Circuit Court of Appeals in that case, and cites it. It does not criticise it, but on the contrary inferentially approves it. The court did not even see fit to attempt to distinguish the Stone case. There can be but one explanation, and that is that the court considered the Bacheldor case so unilke the Stone case in its facts that the latter was of little assistance in reaching a conclusion in the former, and that any effort to distinguish the two cases would be superfluous. An examination of the records in the two cases makes apparent the correctness of this view. It is to be borne in mind that the decision in the Stone case is expressly confined to the "facts" there "presented." No attempt is made to give the word "adjacent" a fixed or inflexible meaning of universal application. No criticism is made of the decisions theretofore rendered announcing general principles as guides in determining the question of "adjacency" in particular cases. Upon what facts or in what respect is there any analogy between the Stone case and the Bacheldor case? Granting the other facts to be analagous, does it logically follow that because fifty miles is held to be "*distant*" and not "*near to*" or "*adjacent,*" therefore twenty or twenty-five miles is also "distant?" Other features radically distinguish the two cases, but this alone would be sufficient. It is significant in this connection that in

Denver & Rio Grande Ry. Co. vs. U. S., 34 Fed. 841,

Judge Brewer, in suggesting what would be "*distant lands*" mentions "lands fifty or one hundred miles away" instead of lands twenty-five miles away. Nor does the general definition of "adjacent lands" as given in the Stone case bring it into conflict with the Bacheldor case. That lands to be "adjacent" must be in proximity or contiguous or near to the railroad is not a new doctrine, but has been conceded by nearly all of the courts. It is also conceded that a railroad has no right to go upon "distant lands" to cut timber. These general principles have almost without exception been uncontroverted. The difficulty has arisen and a diversity of opinion has resulted only when it came to determining in each particular case how many miles there should be between the "line of the road" and the line of separation between "adjacent" and "distant" lands. Upon this point the Stone case says only that "under the facts presented" in that case this line should not be a distance of fifty miles from the railroad. It is not suggested that twenty or twenty-five miles is too great a distance; nor is it even held that under no circumstances could lands fifty miles away be considered "adjacent."

Now, what essential features are there in common to the case at bar and the Stone case, that the latter should be held to control the former? The timber involved in the Stone case was for the construction of two railroads, the Spokane & Palouse Railroad and the Central Washington Railroad. These roads branch off from the Northern Pacific Railroad, one extending southwesterly and the other extending northwesterly at points on the Northern Pacific eight miles apart.

The timber in question was cut about fifty miles easterly from the eastern end of these branch lines and along the line of the Northern Pacific Railroad.

By reference to the transcript of the record for the facts in the case at bar, and comparing them with the facts in the Stone case, we have the following comparative statement of conditions, namely:

FIRST.—In the case at bar the timber was cut from 17 to 26 miles from the place where it was actually used in railroad construction. In the Stone case the timber was cut about fifty miles easterly from the easterly end of the railroads for the construction of which it was cut; and at various distances in excess of fifty miles from the points where it was used. The materialty of this distinction has already been commented on.

SECOND.—In the case at bar the lands from which the timber was cut were near enough and were so located with reference to the railroad under construction as to be directly and materially benefitted thereby. The fundamental purpose of the Act of 1875 was being fulfilled by the construction of this road; these public lands were being enhanced in value; the plaintiff in error was upon the agreed facts shown in the record, receiving a valuable return for the timber taken. In the Stone case the roads under construction could certainly benefit the lands from which the timber was taken only in the most indirect way, if at all. The region where the timber was cut had already been penetrated by a railroad along the trunk line of which the lands lay. Situated as they were fifty miles from the termini of these branch roads, it is difficult to see,

and it certainly does not appear from the record what material advantage would accrue to them by reason of the construction of these roads.

THIRD.—In the case at bar the timber could with reasonable profit be hauled by wagon from the place where it was cut to the place where it was used. That is, it was not very near to any other railroad, and it was not very far from this one. In the Stone case it is apparant that such was not the case. The lands were situated too near a line of railroad in operation to permit a profitable wagon haul for a distance necessarily of at least fifty miles. The principle involved in this distinction first announced by Judge Hallett in United States vs. Denver and Rio Grande Ry. Co., 31 Fed. 886, and favorably regarded by other courts, was criticised by the plaintiff in error in the court below as wholly arbitrary, but we submit that this characterization is not justified. That case also had for its basis the primary purpose and intent of the Act of 1875, which was to open for settlement and enchance the value of public lands by making them commercially accessable through the construction of railroads. It is evident that lands from which timber could be profitably hauled by wagon for railroad construction, must under no circumstances be very far distant from the line of such road, and it is also obvious that as a rule such lands do not lie near a constructed railroad; that they lie in a region not yet penetrated by railroad construction; that for the purpose of making them practically accessible for settlement and of making them available, railroad construction is necessary; that, in

short, as to such lands the purpose of the Act of 1875 has not yet been fulfilled.

In view of these distinguishing featurers, it is pertinent again to inquire how or why the Stone decision should be held to conclude this defendant. In distance, this defendant went less than half as far as Stone. In the Stone case neither the Circuit Court of Appeals nor this court attempted to lay down any general rules or criticise any rule theretefore laid down by other courts and followed by this defendant. The facts being essentially different, what principle, doctrine, rule or suggestion is there in the Stone case by which the facts in this case are to be controlled?

If rules heretofore announced and never yet criticised by courts of authority are to be deemed arbitrary and not founded on reason, what rule or principle shall guide us in determining whether or not to accept the inducement supposed to be offered by the Act of 1875? Granting that "contiguous" is safe, and fifty miles is unsafe, where between these limits is the danger line? Is there no chart, compass or guide? Plaintiff in error suggests none, and we submit that while possibly not in themselves conclusive, practicability of wagon haul and direct benefits to lands, are important conditions to be considered in determining the question of "adjacency," and we further respectfully submit that there is no conflict between the Stone case and the Bacheldor case, and that the latter contains a correct exposition of the law as applicable to the facts herein involved.

MEASURE OF DAMAGES.

In view of the law as above cited, discussion of the rule of damages seems almost superfluous.

But should it be held that the lands were not "adjacent," still we contend that plaintiff should recover only for "stumpage" value, namely, at the rate of $1.50 per thousand feet.

Prior to the decision in Woodenware Co.. vs. U. S., 106 U. S. 432, there was much conflict of authority upon the question whether or not the amount of recovery should under any circumstances exceed the stumpage value. But the rule established by that case is, as we understand it, as follows: (1.) When the defendant is a knowing and willful trespasser, the full value of the property at the time of bringing the action, with no deduction for his labor and expense; (2.) When the defendant is an unintentional or mistaken trespasser, the value at the time of conversion, less the amount which such trespasser has added to its value.

We contend that if defendant in this case is a trespasser at all, it is of the second class.

In a sense it made no mistake as to facts. That is to say, defendant knew that this timber was upon the lands of plaintiff, and the distance of the lands from its right of way, and the other particular facts and circumstances. But if the question of "adjacency" is a mixed question of law and fact, and it should finally be held that defendant is a trespasser, then clearly defendant acted under a mistake of both law and fact. It is clear that it did not act rashly, or carelessly, or indifferently. It is expressly stipulated that it acted

in good faith and exercised ordinary care and prudence in an honest endeavor to learn the extent of its rights. It intended no wrong, it concealed no facts it relied upon and followed competent advice.

Under the circumstances, were the mistake merely and purely one of law, the conclusion must be the same. It is no answer to say that ignorance of the law excuses no one. Defendant is not seeking to be excused. If it made a mistake it should and is willing to suffer the legitimate, natural consequences. That is, simply to fully compensate the wronged party for his loss. In this case the actual loss of the plaintiff is measured by the value of timber taken, as it stood upon the ground at the moment of the taking.

But we contend the circumstances of the case and the conduct of the defendant do relieve it from punitive damages—and the first rule above stated is essentially punitive in its nature. Primarily it is invoked not for the purpose of making the plaintiff whole, but to punish the defendant and to deter others from like conduct.

Defendant's conduct was not reprehensible, and should not be punished. It took all reasonable precaution. Its only alternative was to abandon what it had reason to believe was its rights. To impose a severe penalty on such conduct would result in the assertion by railroad companies of their right to cut timber only in the clearest cases, thus discouraging in many regions the very enterprise which the Act in question was intended to promote.

It is not necessary that the mistake be concerning probative or even ultimate facts.

If each of two men claimed to be the owner of a horse running in the pasture, and there was no dispute as to the facts, but only a difference of opinion between them and their respective counsel as to the legal effect of the facts, and one of them openly, in good faith, and pursuant to the advice of his attorney, took the animal and converted it to his own use, would not the measure of damages be the value of the animal at the time of its conversion without any penalty, should the other claimant sue and be successful in establishing his title? There was a mistake of law simply, but it involved an honest mistake as to true ownership.

So here, granting that there was a mistake, and it involved only the law, yet there was an honest mistake as to the real ownership of so much of the timber as was necessary to construct defendant's road. It belonged to the plaintiff until defendant complied with the Act of 1875, and thereupon defendant in good faith and reasonably believed that ownership was transferred to it by the terms of the general grant.

The rule as announced by the court in Woodenware Co. vs. U. S., supra., must be read in the light of the principles upon which it is expressly based.

The court says:

> "We cannot follow counsel for the plaintiff in error through the examination of all the cases, both in England and this country, which his commendable research has enabled him to place upon the brief. In the English courts the decisions have in the main grown out of coal taken from the mine, and in such cases the principle seems

to be established in those courts, that when suit is brought for the value of the coal so taken, and it has been the result of an honest mistake as to the true ownership of the mine, and the taking was not a wilful trespass, the rule of damages is the value of the coal as it was in the mine before it was disturbed and not its value when dug out and delivered at the mouth of the mine. Martin vs. Porter, 5 Mees. & W., 351; Morgan vs. Powell, 3 Ad. & El. (N. S.), 278; Wood vs. Morewood, 3 Ad. & El., 440; Hilton vs. Woods, L. R. 4 Eq., 432; Jegon vs. Vivian, L. R., 6 Ch. App., 742.

"The doctrine of the English courts on this subject is probably as well stated by Lord Hatherly in the House of Lords, in the case of Livingston vs. Rawyards Coal Co., 5 App. Cas., 25, as anywhere else. He said: 'There is no doubt that if a man furtively, and in bad faith, robs his neighbor of his property, and because it is underground is probably for some little time not detected, the court of equity in this country will struggle for, or, I would rather say, will assert its authority to punish the fraud by fixing the person with the value of the whole of the property which he has so furtively taken, and making him no allowance in respect of what he has so done, as would have been justly made to him, if the parties had been working by agreement.' But 'when once we arrive at the fact that an inadvertence has been the cause of the misfortune, then the simple course is to make every just allowance for outlay on the part of the person who has so acquired the property, and to give back to the owner, so far as is possible under the circumstances of the case, the full value of that which cannot be restored to him in specie.

"There seems to us to be no doubt that in the case of a willful trespass, the rule as stated

above is the law of damages, both in England and in this country, though in some of the State courts the milder rule has been applied even to this class of cases. Such are some that are cited from Wisconsin. Single vs. Schneider, 24 Wis., 299; Weymouth vs. R. R. Co., 17 Wis. 550.

"On the other hand, the weight of authority, in this country as well as in England, favors the doctrines that, where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern, or if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition."

While the words "willfully and knowingly" sometimes denote only that the person knows what he is doing and acts of his own volition, yet generally they signify an evil intent.

The courts have defined the terms used, as follows:

"Doing or omitting to do a thing knowingly and wilfully, implies not only knowledge of the thing, but a determination with a bad intent to do it, or to omit doing it. 'The word *willfully*,' says Chief Justice Shaw, 'in the ordinary sense in which it is used in the statutes, means not merely *voluntarily*, but with a bad purpose.' Com. vs. Kneeland, 20 Pick., 220.

" 'It is frequently understood,' says Bishop, 'as signifying an evil intent without justifiable excuse.' Cr. L. Vol. 1, Sec. 428. Felton vs. U. S. 96 U. S. 699, 24 L. Ed. 875. Cited and approved in Potter vs. U. S. 155 U. S. 438; 39 L. Ed. 214.

A wilful act is one committed with an evil intent,

with a legal malice, without reasonable ground for believing the act to be lawful, and without legal justification.

Bowers vs. State, 24 Tex. App. 542.
R. R. Co. vs. Nash. (Ind.) 24 N. E. Rep. 884.
State vs. Preston, 34 Wis. 682.

The last case contains an excellent discussion with numerous citations.

The rule we contend for is well expressed by the Supreme Court of New York:

> "The measure of damages for cutting and taking away trees, when done in good faith, under claim of title, is the value of the trees as standing timber, and not their value as augmented by defendant's labor in converting them into logs."

Clark vs. Holdridge, 43 N. Y. S. 115.
12 App. Div. 613.

Winchester vs. Craig 33 Mich., 205, is a well considered case. The syllabus is in part as follows:

> "Marston, J. with whom Cooley, Ch. J. concurred, holding, that in the absence of *fraud*, *violence*, or *wilful negligence* or *wrong*, the proper measure of damages generally in trover, as in other like actions, is such a sum as will afford compensation for the actual injury sustained."

In the course of the discussion the Court says:

> "There is another class of cases where the doctrine which the plaintiff seeks to have applied would work gross injustice: a person honestly and in good faith obtains posses-

sion of some young animal; he may have purchased it from some person supposed to have a good title to it, but who in fact did not; or *he may have purchased it at a judicial sale, where, on account of some technical defect, the title did not pass;* or it may be through a case of mistaken identity, he has claimed to be the owner, whereas, in truth and fact he was not. He retains possession, feeding and taking care of the animal until it became full grown and immensely more valuable. * * * The original owner having at length discovered his property, demands possession, which being refused, he brings trover to recover the value. Now most assuredly in any of these cases, the extent of the injury which the plaintiff sustained would not be the then value of the animal. He has not fed it, taken care of it, or run any of the risks incidental to the raising of stock. All this has been done by another. Why then should the result of the labor, care and expense of another just be given to him?"

"In this case each has an interest in the logs; the plaintiff as the assignee of the original owner; the defendant by, in good faith, largely increasing their value. Each should be protected in his rights, and thus as nearly as possible, substantial justice will be done. To allow plaintiff to recover what he here seeks would be to break down all distinctions between the wilful and the involuntary trespasser; a distinction which is based upon sound legal principles, and which is applied in all other forms of action."

"Where defendant's conduct, measured by the standard of ordinary morality and care, which is the standard of the law, is not chargeable with fraud, violence, or wilful negligence or wrong, the value of the property taken and converted is the measure of just compensation. * * * *

> "Where there is no wrongful purpose or wrongful negligence in the defendant, compensation for the real injury done is the purpose of all remedies."
>
> Forsyth vs. Wells, 41, Pa. St., 291.

In Baker vs. Drake, 53 N. Y., 211; Markham vs. Jaudon, (41 N. Y., 235), which laid down the harsher rule of damages, is expressly overruled.

One of the syllabi is:

> "The rule of damages in civil actions does not depend upon the form of action. Whether it be in contract or tort, the proper measure of damages, except where punitive damages are allowable, is a just indemnity to the party injured, for the loss which is the natural, reasonable, and proximate result of the wrongful act complained of, and which a proper degree of prudence, on the part of the complainant, would not have averted."

In Heard vs. James, 49 Miss., 236, one of the syllabi is:

> "The rule for the measure of damages for the wrongful taking or detention of property is to be determined by the animus of the conversion. If the act was in good faith upon some supposed right of claim or error, the measure will be the value of the property at the time it was taken; but if the taking or conversion be characterized by malice or oppression, damages may be punitive, and in an action for its recovery no allowance will be made the defendant for any increased value that may be bestowed by skill and labor on the property."

Gaskins vs. Davis, (N. C.) 25 L. R. A. 813, is an instructive case. We quote:

"The weight of authority, it must be conceded, sustains the rule, that where the action is brought for damages for logs cut and removed in the honest belief on the part of the trespasser that he had title to them, the measure of damages is the value in the woods from which they were taken, with the amount of injury incident to removal, not at the mill where they were carried to be sawed. Tilden vs. Johnson, 52 Vt. 628, 36 Am. Rep. 769, and note, 770; Herdic vs. Young, 55 Pa. 176, 93 Am. Dec. 739; Hill vs. Canfield, 56 Pa., 454; Moody vs. Whitney, 38 Me. 174, 61 Am. Dec., 239; Cushing vs. Longfellow, 26 Me.. 306; Goller vs. Fett, 30 Cal., 482; Foote vs. Merrill, 54 N. H., 494, 20 Am. Rep., 151; Lake Shore & M. S. R. Co. vs. Hutchins, 32 Ohio St., 581.

"In the absence of any evidence that would justify the assessment of vindictive damages, there is only one exception to the rule as we have stated it, and that is, where the trees destroyed are not the ordinary timber of the forest, but are peculiarly valuable for ornament, or as shade trees."

In United States vs. N. P. R. Co. et al., 67 Feb. 890, the mistake was purely an error in law; no mistake of fact was involved. The syllabus is:

"The N. Ry Co. cut certain timber on lands which were, in good faith, supposed to be included in a grant to it, and caused the same to be manufactured into lumber. In an action against the railway company for trespass, it was afterwards adjudged that the land on which the timber was cut was public land. Held that, the trespass having been unintentional, the true measure of damages was the value of the standing timber at the time it was cut, and not that of the manufactured lumber after increased value had been added by the defendant's la-

bor. Wooden-ware Co. vs. U. S., 1 Sup. Ct. 398, 106 U. S. 434, followed.

The court in conclusion says:

"The Supreme Court, in Wooden-ware vs. U. S. 106 U. S. 434, 1 Sup. Ct. 398, has declared the doctrine that 'where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern.' This case comes clearly in the rule thus defined. It was the general belief at the time the timber was cut that the land in question was within the grant to the Northern Pacific Railroad Company of July 2, 1864, and that the date of said grant was anterior to that of the Oregon Central Railroad Company. Judge Sawyer so held in this case, in the judgment which was reviewed on writ of error from the Supreme Court. There can be no doubt that the defendant honestly believed that the title to the land had passed to the Northern Pacific Railroad Company, and that it was no longer public land. The testimony shows that the value of the standing timber at the time it was cut was about seventy-five cents a thousand feet, and it is the judgment of the court that the entry of judgment heretofore made in said cause in favor of the United States for $2,095 be set aside, and that judgment be entered in favor of the United States against the defendants for the sum of $220 and costs."

See also Sedgwick on Damages, 8th Ed., pars. 503, 504.

The case of the United States vs. Murphy, cited by plaintiff in error, in the Circuit Court of Appeals, is, we submit, not in point. That was a criminal prosecution, for the violation of a positive statutory law, providing a penalty regardless of the intent of the

trespasser: no such law is involved in the consideration of this case.

We respectfully submit that defendant had a right to cut the timber; and that if it made a mistake, it still acted in good faith and reasonably, and that therefore the measure of damages if liable at all, is "stumpage" value.

Respectfully submitted,

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